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No. 91-1879

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROSE ACRE FARMS, INC.,
Petitioner,

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Rose Acre Farms, Inc. ("Rose Acre"),[1] respectfully submits this reply brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Rose Acre incorporates by reference the list of corporate parties appearing on page ii of the Petition for Writ of Certiorari.

THE QUESTIONS PRESENTED ARE RIPE AND MERIT REVIEW

Rather than confront the questions presented by Rose Acre's Petition, the Brief in Opposition attempts to sidestep them. Respondents do not dispute that the first two questions are cert-worthy on the merits.[2] Respondents instead assert that the issues are not ripe or raised by the case. To advance that position, respondents must resort to mislabeling Rose Acre's claim for judicial review of administrative action as a claim for compensation. The magic wand of mislabeling makes Rose Acre's claim disappear from the District Court, and only permits it to materialize in the Claims Court, according to respondents. Mischaracterizing Rose Acre's claim, however, does not do the trick for respondents.

Rose Acre is not asserting a claim for compensation in this case. It is asserting a claim that a regulatory scheme is invalid because it does not provide for statutorily mandated compensation. Rose Acre does have a clear right to compensation under the statute. That right to compensation, however, does not divest Rose Acre of its rights under the Administrative Procedure Act to be free from regulations that are arbitrary, capricious, or otherwise contrary to law. It is the right to be free from such regulations that Rose Acre is asserting in this case to prevent irreparable injury. The government's regulatory scheme unlawfully failed to include a statutorily mandated compensation provision. The fact that a compensation provision is involved does not extinguish Rose Acre's right to challenge the regulations; it simply means

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[2] Regarding the third question presented, respondents' treatment of *Bowen v. Massachusetts*, 487 U.S. 879 (1980), gives new meaning to the term revisionism. Were one to base an understanding of *Bowen* on the description and analysis contained in the Brief in Opposition, one would erroneously conclude that *Bowen* expanded the jurisdiction of the Claims Court. The best refutation of the Brief in Opposition's treatment of *Bowen* and its progeny is a fair reading of the cases.

that unlike some other situations where a party is injured by arbitrary and capricious governmental regulations, Rose Acre has a retrospective remedy for past injuries in addition to its APA remedy to prevent irreparable prospective harm.

The fundamental premise of the Court of Appeals' decision—a premise that permeated its entire analysis—was its holding that even if compensation is required, the regulations should not be set aside. Unwilling to address the arguments raised in the Petition and unable to defend this holding of the Court of Appeals, respondents attempt to dismiss it as "brief dictum." Brief in Opposition at 11. It is dictum and the case is not ripe for review, we are told, because "no court has in fact made . . . a determination [that compensation is required.]" *Id.* In fact, the District Court made just that determination. Pet. App. 39a-46a. The Court of Appeals did not rule on the compensation issue only because of its holding—not dictum—that even if compensation is required, the regulations should stand. The Court of Appeals *should* have decided, as did the District Court, that the statute requires the regulations to provide compensation,[3] that the regulations were promulgated contrary to that requirement and that the entire regulatory scheme is consequently unlawful. The Court of Appeals' refusal to affirm the District Court's judgment on these issues is what this Petition is all about. The questions are plainly ripe and merit review.

Respondents' position is essentially this: While denying that Rose Acre has a right to compensation, respondents maintain that Rose Acre's right to compensation divests it of its right to be free from regulations that are contrary

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[3] It is telling that respondents attempt to resurrect the argument that the restrictions under the SE regulations are not tantamount to an order of destruction. Br. in Opp. at 15-17. The District Court flatly rejected this position. Pet. App. 39a-41a, and 44a-45a, and the Court of Appeals ridiculed it, Pet. App. 4a.

to law, but that Rose Acre has to wait for the Claims Court to tell it that the right to compensation does not exist. The law is not so convoluted or draconian.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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